

Meeting Date: 4-25-06

Santa Clara



AGENDA REPORT

City of Santa Clara, California

Agenda Item # 5.E



DATE: April 25, 2006

TO: Mayor and Council for Information

FROM: City Manager

SUBJECT: Additional Background Information and Responses to Council Questions from the April 11, 2006 Council Meeting – Agenda Item 5.E.

Attached are responses to additional questions raised at the April 11, 2006 City Council meeting, relating to binding arbitration.

The attached report includes responses covering the following topics:

- The responses to Questions #31, 32, 33 include information from Police Officers' Association (POA) President Pat Nikolai relating to three specific questions addressed by Council to the Unions.
- County of Santa Clara: Failed binding arbitration ballot measures in the November 2004 election.
- Essential components of binding arbitration charter provisions in 5 cities; Alameda, Gilroy, Palo Alto, Redwood City and San Jose.
- Information regarding State Senate bill 402 and 440.
- What "conditions of employment" may be submitted to the Board of Arbitrators? Who decides what "conditions of employment" are subject to the Board's jurisdiction?
- How does this measure interact with other Charter provisions, especially those governing the Civil Service Commission?
- Can the City be required to amend and/or repeal ordinances as a result of a Board of Arbitration decision?
- Can an incorrect binding arbitration award be set aside by the court?
- Police Chief added information regarding City of Palo Alto and 2003/04 Negotiations follow-up (additional responses to Questions 17 and 27 as given in the April 21, 2006 Agenda Report).
- Additional information regarding Question #21. City of Sunnyvale November 1998 Election regarding binding interest arbitration.
- Additional information regarding Question 20. In the staff research, were there any agencies where services were cut or local control was taken away?

Jennifer Sparacino
City Manager

Documents Related to this Report:

- 1) *Additional Responses To Questions From The April 11, 2006 Study Session Regarding Binding Arbitration*
- 2) *Human Resources Matrix "Binding Interest Arbitration – Select Agencies"*

**ADDITIONAL RESPONSES TO QUESTIONS FROM THE
APRIL 11, 2006 STUDY SESSION REGARDING BINDING ARBITRATION**

1. **Would the unions plan on promoting as endorsement by Council if this is put on the ballot or are you willing to make a commitment not to promote it as such if Council would put it on the ballot?** (Response received from POA President.)

The unions are not planning on promoting that the Council endorses this proposal if they put it on the ballot. We will be seeking individual endorsements and using those.

2. **Has there been any circulation of petitions?** (Response received from POA President.)

The unions have started circulating petitions in the City.

3. **The unions have offered to pay for the binding arbitration initiative if the Council puts it on the ballot, what if it goes on through the initiative, does that offer for the unions to pay still apply?** (Response received from POA President.)

The unions have only limited financial resources. If we are forced to gather the full amount of signatures to use the initiative process, we will be unable to pay the ballot costs that are incurred.

4. **Was binding arbitration on the ballot for County of Santa Clara? What were the results?**

In the November 2004 election, the County of Santa Clara had two ballot measures submitted to the voters, relating to binding arbitration. Both measures failed. The actual measures are listed below.

This measure was placed on the ballot by a unanimous vote of the Board of Supervisors and affects attorneys, nurses and correctional officers.

Measure B. Impasse Procedures

County of Santa Clara (Charter Amendment - Majority Approval Required)
Shall the Charter be amended to permit the voters to approve or disapprove decisions made by arbitrators in labor negotiation disputes after the Board of Supervisors finds that those decisions will substantially interfere with the Board's authority over the financial and employment affairs of the County or will result in greater cost than the County's last proposal during negotiations, if the Charter has been amended to require binding arbitration for labor negotiation disputes?

This measure was placed on the ballot by a petition initiative sponsored by the employee organizations of attorneys, nurses and correctional officers.

Measure C. Binding Arbitration

County of Santa Clara (Charter Amendment - Majority Approval Required)
Shall the Charter of the County of Santa Clara be amended to supersede dispute resolution processes contained in State and County law in the event that bargaining is unsuccessful, to impose binding arbitration to resolve negotiation disputes over wages, hours or other terms and conditions of employment between the County of

Santa Clara and unions representing certain County attorneys, certain officers employed by the County Department of Correction, and certain County registered nurses, who currently resolve disputes pursuant to law?

5. **Essential components of binding arbitration charter provisions in 5 cities; Alameda, Gilroy, Oakland, Palo Alto, and San Jose.** [See attached matrix to this report.]

The Human Resources Department reviewed the specific charter language in six cities: Alameda, Gilroy, Oakland, Palo Alto, Redwood City and San Jose. The attached chart "Binding Interest Arbitration – Select Agencies" provides details. City of Alameda Charter provisions are limited to specific economic issues only. The other five cities tend to have similar language to the proposal for Santa Clara. Some use "grievance" rather than "labor disputes." Four apply to police and fire personnel, with two applying to fire only. Five specify three member arbitration panel; one city specifies one arbitrator.

6. **Information regarding State Senate Bill 402 and 440.**

Is the proposed ballot measure constitutional?

In Fire Fighters Union, Local 1186, v. City of Vallejo (1974) 12 Cal.3d 608, the California Supreme Court held that proper subjects of bargaining are also arbitrable under a city charter's binding interest arbitration clause. However, court rulings on two recent state measures implementing binding interest arbitration for all cities casts some doubt on the matter.

The first attempt by the Legislature to enact statewide binding interest arbitration for public safety units was SB 402, which required arbitration only over economic issues. (Ironically, the State Legislature exempted itself from such restrictions.) Local agencies believed that SB 402 was constitutionally flawed in several respects, including that it violated article XI, section 11(a) of the California Constitution because it delegated powers over municipal functions and municipal finance to private persons, and it violated article XI, section 5(b) of the California Constitution, which gives charter cities "plenary authority," subject only to the restrictions of article XI itself, to control the compensation of their employees. On April 21, 2003, the California Supreme Court ruled that SB 402 was unconstitutional, with all seven justices agreeing that the plain language of the constitution prohibits such a delegation of authority to a private party.

In reaching the conclusion that SB 402 violates the constitution, the Court emphasized "there is a clear distinction between the substance of a public employee labor issue and the procedure by which it is resolved." The Court concluded that SB 402 is not merely procedural because it permits a body other than the county's governing body to establish local salaries.

The Legislature responded by enacting SB 440. It attempted to cure the problems of SB 402 by providing that the legislative body could, by unanimous vote, overturn the determination of an arbitrator in a binding interest arbitration. At least one trial court has held this process to be unconstitutional because it does not create a substantive veto power in the legislative body. Whether such logic would apply to the current measure may be a subject for litigation.

Is the proposed ballot measure permitted by California codes governing labor relations?

The proposed measure is neither permitted nor prohibited by California codes governing labor relations, although it may be argued that it is inconsistent with certain provisions of the Meyers-Milias-Brown Act, the statute governing local agency labor relations.

7. **What “conditions of employment” may be submitted to the Board of Arbitrators? Who decides what “conditions of employment” are subject to the Board’s jurisdiction?** (Response to Question 10 from the Agenda Report dated April 21, 2006 also elaborates on this question.)

The measure provides that “all matters relating to the wages, hours, and other terms and conditions of City employment, including the establishment of procedures for the resolution of disputes concerning the interpretation of application of any negotiated agreement” shall be subject to negotiation, and that “all disputes or controversies pertaining to wages, hours, or terms and conditions of employment which remain unresolved after good faith negotiations . . .” are subject to arbitration.

Although the City may argue that certain issues are outside the scope of the language of the binding arbitration measure, the proposed measure potentially allows submission of a broad range of issues found in other City documents to binding arbitration, including:

- City Charter: City Council authority over fiscal matters; City Manager authority over administrative matters, especially hiring and disciplinary matters; Fire and Police Chief authority over operational issues.
- Civil Service Rules: examinations, grievance review process, appointments, transfers.
- Memoranda of Understanding: reservation of management rights clauses.
- Employer-Employee Relations Ordinance: impasse procedures; bargaining unit determination procedures.
- City Manager Directives: many directives, including but not limited to grievance procedures, meal policies, sick leave usage, training, off-duty employment, flexible work schedules, conference and meeting attendance, recovery of court expenses, examinations, workplace security.

Because this language is vague and somewhat broad, issues that are now submitted to the grievance process (which has been in place for over 30 years), including disciplinary decisions, hiring and promotional qualifications, and pay points may now be submitted to arbitration instead of to the Civil Service Commission. Although the City would argue against any overly-broad construction of the language, the Board of Arbitrators may determine that the issue falls within their jurisdiction, and proceed to bind the City to a particular disciplinary action, or other grievable matter.

8. **How does this measure interact with other Charter provisions, especially those governing the Civil Service Commission?**

The proposed measure either contains language that directly or indirectly conflict with, or, by potentially allowing submission of a broad range of issues to binding arbitration, may impact or even override the following Charter provisions: Council authority over fiscal matters; City Manager authority over administrative matters, especially hiring and disciplinary matters; Fire and Police Chief authority over operational issues. In regards to the Civil Service Commission, the proposed

measure may conflict with the Commission's powers over civil service examination and duty to provide qualified appointees, and to hear petitions by employees and applicants (Section 1011.)

9. **Can the City be required to amend and/or repeal ordinances as a result of a Board of Arbitration decision?**

The binding arbitration measure provides that the City "shall take whatever action is necessary to carry out and effectuate the final Arbitration Board award and incorporate any amendments or modifications agreed to by the parties" Although the City may argue such language cannot trump the constitutional grant of power to the City and require the City to amend other documents, an arbitrator may order the City to do so and the employee associations may attempt to force the City to do so by court order.

10. **Can An Incorrect Arbitration Award Be Set Aside By the Courts?**

There are limited options available under the California Arbitration Act (the Act) to set aside an arbitration award based on a misapplication or misinterpretation of fact or law.

The Act only allows an award to be set aside if: (1) the award was procured by corruption, fraud or other "undue means"; (2) an arbitrator was corrupt; (3) the rights of a party were substantially prejudiced by arbitrator misconduct; (4) the arbitrator exceeded his or her powers and the award cannot be corrected without affecting the merits of the decision; or (5) the rights of a party were substantially prejudiced by the refusal of an arbitrator to postpone a hearing, to hear material evidence, or by other conduct that violates the provisions of the California Arbitration Act. Code of Civil Procedure section 1286.2.

Thus, even if an award is based on incorrect facts, or an incorrect interpretation or application of law, it cannot be set aside by the courts even if it causes "substantial injustice" to one of the parties. Moncharsh v. Heily & Blase (1992) 3 Cal.4th 1. This extremely limited scope of review is followed by the courts to ensure that an arbitrator's decision is truly "binding" upon the parties. Marsch v. Williams (1994) 23 Cal.App.4th 238.

11. **Has binding arbitration caused Palo Alto to have financial distress? Has binding arbitration been successful in Palo Alto?** (Response to Question 27 from the Agenda Report dated April 21, 2006 also elaborates on these questions. Responses provided by the Chief of Police.)

An example of a case taken to binding arbitration in Palo Alto had to do with a minimum staffing level for the rank of agents (an official position within the Palo Alto Police Department). The arbitrator's decision required a higher level of daily staffing than management believed necessary. This led to a greater expense for the City.

According to the official from Palo Alto, the arbitrator's decisions have been mixed. Some favor the City, some the labor union. This should not be looked upon as "fair" because one decision could have more far-reaching effects than the next.

12. **Can more details be provided about the follow-up to the 2003/04 Employee Negotiations?** (Response to Question 17 from the Agenda Report dated April 21, 2006 also elaborates on this question. Response provided by the Chief of Police.)

The most important change that was agreed upon was that the City and the bargaining unit would meet before negotiations begin to discuss the financial condition of the City. In the past, these discussions take place at the table where each side has its own interests at stake and therefore, the information is viewed with a jaundiced eye. If these discussions took place away from the negotiating table, it would help build trust in the statements that are made at the table.

In my mind, this may be the crux of the issue. The last negotiations were more difficult than usual because of two issues. The city was facing extremely challenging financial issues as a result of the significant downturn in the economy. At the same time the employee's costs for retirement (PERS) was skyrocketing (ironically for the same reason). At the time the POA got the enhanced retirement (3% at 50) it was agreed that the POA would pay for the increased cost of the benefit. Our police officers were facing double digit reductions in pay as that salary money was to be diverted to pay PERS. In the last negotiations they were asking the city to offset some of that salary reduction at a time that the city was having problems of it's own. Negotiations grounded to a halt as a result. Because these financial discussions were being negotiated at the table, each side had the perception that the other was not being entirely forthcoming.

13. **Additional information regarding Question 21: City of Sunnyvale November 1998 Election regarding binding interest arbitration.**

The Sunnyvale City Council submitted two measures to the voters regarding binding interest arbitration; one measure on the Council's own motion; one measure as a result of a petition drive.

This measure was placed on the ballot by Sunnyvale City Council.

City of Sunnyvale Measure S

Shall the Sunnyvale City Charter be amended to require voters approval of any labor agreement resulting from binding arbitration or fact finding before the agreement may become effective, if the provisions negatively affect management rights or require additional revenues or appropriations, or if either side wishes to seek voter approval?

This measure was placed on the ballot by a petition initiative.

City of Sunnyvale Measure T

Shall the Sunnyvale City Charter be amended to provide that disputes about wages, hours and other terms and conditions of employment that cannot be resolved by negotiations between the City and the Public Safety Officers Association and the Communications Officers Association be subject to binding arbitration which is final without City Council or voter approval?

Both measures failed.

14. **In the staff research, were there any agencies where services were cut or local control was taken away? (Response to Question 20 from the Agenda Report dated April 21, 2006 also elaborates on this question. Response provided by Fire Chief.)**

In one example, the fire chief from a fire protection district in northern California, told of a situation where an employee discipline was taken to arbitration. The arbitration took three years to complete. During that time, the employee was not on duty and the fire district was unable to hire for the position due to the appeal. The fire district prevailed; however, the cost of arbitration including attorney fees was over \$100,000 for the district and in addition, the fire district had to pay overtime

for three years in order to fill the vacant position that was on hold. A shift in allocation of resources had to be made in order to pay the direct and indirect costs associated with this arbitration.

The most glaring example of a negative impact that comes as the result of binding arbitration can be seen in the Detroit Police Department arbitration of 1978. The award cost the city an additional \$48 million which ultimately caused the city to reduce staffing in the police department first by 350 members through attrition and then an additional 1,400 police officers through layoffs. During this period of time, according to the police department statistics, crime increased 15.4 percent. This information was gathered by the Mackinac Center for Public Policy, which is an independent research and education institute. The report is careful to point out that although the 1978 arbitration award had a negative impact, not all of the impact on the city's budget was due solely to the arbitration.

Another fire chief from a fire department here in the Bay Area told me that 85 percent of their current contract is the result of four arbitrations. He was not concerned about the fiscal impact nearly as much as he was concerned about how much the Memorandum of Understanding (MOU) will bind the hands of a future fire chief. Even though the fire chief is held ultimately responsible for all aspects of their department, the new chief will have very little opportunity to make management decisions for which he or she will be held responsible.

A shift in financial resources is not the only negative consequence of binding arbitration. Two weeks ago when I spoke to this council I warned that binding arbitration strains relationships. At the time, I was speaking of labor/management relationships. However, just the debate over binding arbitration is beginning to cause some level of strain among employees. Examples of employees who are pressured into believing in one philosophy over another are beginning to surface. Some employees are feeling pressure and even retaliation. Unfortunately, this is consistent with what I heard from nearly every fire chief that I spoke with in the past two weeks; binding arbitration changes the culture. All of them were surprised that a city with Santa Clara's reputation is considering this initiative.